IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI

SC 106/2019
[2019] NZSC 153

BETWEEN	HARJIT DHEIL Applicant
AND	THE QUEEN Respondent

Court:	Glazebrook, O'Regan and Ellen France JJ
Counsel:	J H M Eaton QC and E J Watt for Applicant S K Barr for Respondent
Judgment:	20 December 2019

JUDGMENT OF THE COURT

The application for leave to appeal is dismissed.

REASONS

[1] The applicant, Harjit Dheil, was convicted of blackmailing Amrit Singh (Amrit) after a District Court jury trial. The conduct constituting the offence was threatening Amrit that a woman would be paid to make a complaint against him of sexual misconduct unless he withdrew an employment complaint against the applicant's company, Dheils Ltd. The applicant's co-defendant, Gurchetan Singh (Gurchetan) was acquitted.

[2] The applicant appealed unsuccessfully against conviction and sentence to the Court of Appeal.[1]

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1 *Dheil v R* [2019] NZCA 416 (Stevens, Venning and Dunningham JJ) [CA judgment].

[3] The factual background is set out in the Court of Appeal judgment and it is not necessary for the purposes of the present application to repeat it here.[2]

[4] The applicant seeks leave to appeal to this Court. He seeks to advance four grounds of appeal if leave is granted. We will consider them one by one.

Section 22A of the Evidence Act 2006

[5] The Crown case was that Gurchetan, acting at the request of the applicant, conveyed the applicant's threat to Amrit. Gurchetan communicated with the applicant by telephone during the course of his discussion with Amrit and a letter drafted by the applicant was emailed to Gurchetan who provided it to Amrit to sign. The letter said that Amrit had resolved his employment complaint with Dheils Ltd. Amrit signed this at the end of his discussion with Gurchetan.

[6] Amrit recorded some of the conversation between Gurchetan and him on his mobile phone. The first proposed ground of appeal relates to the admissibility of the recording of the conversation.

[7] The recording was ruled to be admissible by the District Court.[3] A pre-trial appeal to the Court of Appeal against that decision failed.[4] In its pre-trial judgment, however, the Court of Appeal recorded that the issue of admissibility of the recording may need to be revisited at trial.[5] Although an application to revisit the admissibility of the recording was made at the first trial of the applicant and Gurchetan (unsuccessfully), no such application was made at the retrial, at which the applicant was convicted. However, the applicant's appeal to the Court of Appeal was advanced on the basis that the trial Judge, Judge Dawson, ought to have revisited the pre-trial ruling. The Court of Appeal rejected this.[6]

[8] The applicant seeks to argue on appeal to this Court that the Court of Appeal was wrong. He says the pre-trial ruling of the Court of Appeal was made against the

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2 At [4]–[13].
3 *R v Dheil* [2016] NZDC 13850 at [51].
4 *D (CA425/2016) v R* [2016] NZCA 566 at [14].
5 At [14]. See also at [12].
6 CA judgment, above n 1, at [28].

background that the Crown was alleging a conspiracy or joint enterprise between the applicant and Gurchetan. However by the time of the retrial, the Crown case was based on joint principal liability under s 66(1) of the Crimes Act 1961. The applicant submits that no attempt was made to define the terms of any common enterprise or conspiracy. He wishes to argue that in those circumstances, the recordings were not admissible under the co-conspirator's exception set out in s 22A of the Evidence Act.[7] The respondent says that, in fact, the Crown did not abandon its case that the applicant and Gurchetan were acting in concert. It was a central aspect of the prosecution case that Gurchetan had threatened Amrit at the behest of the applicant. Thus, the conclusion of the Court of Appeal was a fact-specific application of orthodox principles, in the Crown's submission.

[9] We accept the Crown's submission that the application is fact-specific: in effect the applicant wishes to argue that the pre-trial ruling needed to be revisited because of the changed basis of the Crown case. However the failure to revisit the ruling would cause a miscarriage of justice only if the exception to the co-conspirator's rule could not apply on the basis of the Crown case as advanced at trial. We are not satisfied that an argument to that effect has sufficient prospects of success to justify a further appeal.

Did the fact that Gurchetan and the applicant gave evidence mean the recording was not a hearsay statement?

[10] The Court of Appeal, having found there was no reason to revisit the pre-trial ruling went on to add that there was no need to rely on the co-conspirator's exception in s 22A because, as it transpired, both co-defendants (the applicant and Gurchetan) gave evidence and were cross-examined. Thus, anything relayed in the recorded evidence about what Gurchetan or the applicant said was not a hearsay statement. The applicant argues that the Court was wrong to make this observation and seeks to advance an argument against that as his second ground of appeal. It is not necessary for us to express a view about the arguability of this point, because of our conclusion in relation to the first ground of appeal. We do not express a view either way.

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7 Citing *R v Messenger* [2008] NZCA 13, [2011] 3 NZLR 779 at [16].

Direction in respect of other hearsay evidence admitted at the trial

[11] The applicant wishes to advance an argument that evidence given by Gurchetan about what he had been told by two non-witnesses, Pankaj and Roohi Gupta, was hearsay and the trial Judge should have given a reliability warning to the jury. The Court of Appeal accepted that this evidence was hearsay but noted that the defence had relied in part on the evidence and therefore a direction to the jury questioning the reliability of the evidence would not have been in the applicant's interests.[8] The applicant takes issue with the Court's view that the defence relied on the evidence in closing.

[12] This is an entirely fact-specific point, no point of public importance arises and we do not consider there is any risk of a miscarriage if leave is not granted on this point.[9]

The trial Judge's directions in relation to the recording

[13] The applicant wishes to argue on appeal that the trial Judge failed to provide a hearsay direction in relation to the recording and failed to identify the limitations of the evidence, particularly the fact that the applicant was not present when the statement was made and so not in a position to challenge what was being said. He says that the Court of Appeal did not address this point in its judgment.

[14] Again we see this as an essentially fact-specific issue that does not give rise to any matter of public importance justifying the grant of leave. Nor do we consider that, in the context of the particular trial, any miscarriage arose from the absence of a direction.

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8 CA judgment, above n 1, at [36]–[39].
9 Senior Courts Act 2016, s 74(2).

Result

[15] We are not satisfied that the criteria for leave to appeal to this Court are met. We therefore dismiss the application for leave to appeal.

Solicitors:
Crown Law Office, Wellington for Respondent